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March 4, 2011

Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
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ENTERED  
Office of Proceedings

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Part of  
Public Record

Re: STB No. 42120, Cargill, Incorporated v. BNSF Railway Company

Dear Ms. Brown:

On April 19, 2010, Cargill, Incorporated ("Cargill") filed a Complaint at the STB alleging that the mileage-based fuel surcharges it was paying BNSF Railway Company ("BNSF") on Cargill's common carrier traffic constituted an unreasonable practice. At the time the Complaint was filed, the assailed mileage-based fuel surcharge was set forth in BNSF Rules Book 6100-A, Item 3375L, Section B ("Assailed Tariff Item"). Cargill's complaint also expressly "cover[ed] any changes to, or modifications of, the Assailed Tariff Item that BNSF may establish during the course of this proceeding" including "successor iterations." Complaint ¶¶ 5, 9.

On February 14, 2011, Cargill filed a letter ("Cargill Letter") supplementing its Complaint to include the rebased mileage fuel surcharge BNSF publicly announced it would be applying to the traffic encompassed by Cargill's Complaint, starting in March of 2011. Cargill took this action after BNSF counsel informed Cargill counsel that BNSF did not believe that Cargill's Complaint covered the rebased fuel surcharge tariff item. Cargill disagreed with BNSF's interpretation, but supplemented its Complaint to address BNSF's asserted concerns. On February 22, 2010, BNSF filed a letter ("BNSF Letter") requesting that the Board treat Cargill's letter as a legal nullity. *Id.* at 1. Cargill respectfully requests that the Board overrule BNSF's objections, and in support hereof states as follows:

(1) BNSF claims that Cargill's Letter "contains no substantive allegations, no description of a cause of action, no indication as to whether or when any cause of action accrued, and no indication as to the type of relief Cargill seeks or the grounds for any relief." *Id.* at 1. In fact, Cargill's Letter clearly supplemented its Complaint by expressly stating that a "successor" iteration of the Assailed Tariff Item included BNSF's rebased fuel surcharge tariff (currently designated as BNSF Rules Book Item 3376D, Section B) or any other fuel surcharge tariff applied to its traffic during the pendency of its case. Cargill Letter at 2. Thus, Cargill clearly put BNSF on notice that the allegations in its Complaint, and the relief requested, applied to BNSF's rebased fuel surcharge. However, to put this hyper-technical objection to rest, Cargill is filing under separate cover a Supplement to its Complaint ("Supplement") that states in pleading terms what Cargill previously stated in its Letter.

(2) BNSF asserts that the fuel surcharge set forth in Item 3376 Section B is "a new surcharge program." BNSF Letter at 1. In fact, the fuel surcharge set forth in Item 3376 Section B is simply a rebased version of the fuel surcharge formula set forth in Item 3375 Section B. Both fuel surcharge formulas utilize a "1 to 4" step function – the fuel surcharge increases by \$0.01 per car-mile for each \$0.04 per gallon increase in the On-Highway Diesel Fuel prices above a stated strike price.<sup>1</sup>

(3) BNSF asserts that its rebased fuel surcharge "did not exist when Cargill filed its Complaint." Letter at 1. That is true, but that is why most shippers that file complaints at the STB, including Cargill, expressly provide that their complaints apply to shipments moving *pendente lite* and to changed tariff designations made *pendente lite*. See, e.g., *Siemens-Allis, Inc. v. Aberdeen and Rockfish R.R.*, 1984 I.C.C. Lexis 505, at \*14, ICC Docket No. 37810S (ICC served May 8, 1984) ("the Commission has traditionally accepted complaints which include relief for shipments moving *pendente lite*"); *AEP Tex. North Co. v. Burlington N. and Santa Fe Ry.*, STB Docket No. 41191 (Sub-No.1) (STB served March 19, 2004) (accepting a supplement to a verified complaint that addressed changed tariff designations, and changed tariff terms, published by the defendant carrier after the initial complaint was filed) ("*AEP-Texas*"); *Arizona Elec. Power Coop., Inc. v. BNSF Ry.*, STB Docket No. 42113 (Feb. 20, 2009 letter filing) (complainant shipper files a letter amending an amended complaint to cover new tariff terms published by the defendant carrier after the amended complaint was filed) ("*AEPCO Supplement*").

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<sup>1</sup> BNSF acknowledges that this is not a "new" program in its December 17, 2010 notice to customers, where it states that "*our fuel surcharge program will be reset from \$1.25 per gallon to \$2.50 per gallon.*" See Cargill Letter, Attachment 1 (emphasis added).

(4) BNSF states that "Cargill cannot effectively amend or supplement its complaint simply by notice of its intent to do so." BNSF Letter at 1. In fact, complainants in STB proceedings routinely amend or supplement their complaints "by notice." See, e.g., *AEP-Texas, supra*; *AEPCO Supplement, supra*; *Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121 (July 26, 2010, Oct. 4, 2010, Jan. 4, 2011, and Feb. 3, 2011 filings) (complainant shipper amends complaint four times by notice); *M&G Polymers USA, LLC v. CXT Transp., Inc.* (Aug. 16, 2010, Oct. 18, 2010 and Feb. 1, 2011 filings) (complainant shipper amends complaint three times by notice).

(5) If the Board concludes that a request or motion is necessary for Cargill's Supplement to be accepted by the Board, Cargill hereby requests that the Board accept the attached Supplement. The Supplement does not expand the issues in this case, does not create a new cause of action, and does not harm BNSF in any way. It simply puts to rest BNSF's misguided construction of Cargill's Complaint as not applying to Cargill common carrier shipments that are or will be subject to new or revised fuel surcharge items published by BNSF during the pendency of Cargill's case.

(6) The Board's Rules of Practice are to be "construed liberally to secure just, speedy and inexpensive determination of the issues presented." 49 C.F.R. § 1100.3. The Board's acceptance of Cargill's Supplement fulfills these objectives, as well as the related objective to avoid piecemeal litigation. *Siemens-Allis, supra*, 1984 I.C.C. Lexis 505, at \*14 ("administrative efficiency dictates that a complainant should be permitted to add to or amend its complaint to include . . . subsequent related movements . . . [to] avoid the piecemeal filing of complaints that could otherwise occur"). Cargill should not have to file multiple complaints to address the same alleged unlawful practices, nor should BNSF be able to dictate the parameters of a shipper's complaint simply through the numbering system it assigns to its tariff items after a shipper's case is filed.

Respectfully submitted,



John H. LeScur  
An Attorney for Cargill, Incorporated

cc: Counsel for BNSF Railway Company